Before the Senate State Administration Committee
March 16, 2007
Testimony of Mark Cadwallader, Dept. of Labor and Industry
House Bill 209

Good afternoon, Madam Chair and members of the Committee. My name is Mark Cadwallader. I am a staff attorney for the Montana Department of Labor and Industry, and have been involved with the administrative rule process in the Department for the last 15 years or so, as a rule writer, as the presiding officer at rules hearings, and as an agency rule reviewer. I have been asked to provide some background information on when and why an agency such as the Department of Labor and Industry might promulgate an interpretive rule using implied rulemaking authority.

From time to time, the Department is asked by its external customers (businesses and workers in Montana) to provide guidance on issues relating to some sophisticated legal topics on labor law matters. Often, it is employers that want to get agency direction on how to approach certain matters related to the employer-employee relationship. When those matters come up frequently enough, we sometimes propose official "advisory only" rules to articulate the broad considerations that an employer needs to take into consideration when making certain business decisions.

One good example is the concept of the "BFOQ" - the bona fide occupational qualification - which is a recognized exception to Montana's laws prohibiting discrimination under Title 49, MCA. Section 49-2-303 (1), MCA, prohibits discrimination on the basis of various protected classes in employment for both the public and private sector, unless there is a reasonable demand for the discrimination based upon the specific job duties. Subsection (3) provides that exceptions to the general prohibition on class-based discrimination that arise from a bona fide occupational qualification be strictly construed.

The question of when a proposed restriction is a bona fide occupational qualification obviously requires a fact-intensive analysis. However, there are some general guidelines and considerations that are broadly applicable in analyzing whether a given restriction is or is not a BFOQ. The Department could draft language to articulate those considerations and guidelines; it would probably be useful for an employer that wants to look at the rules on unlawful discrimination to see that language in order to help the employer understand the concept of BFOQs. Such a rule obviously would be of an advisory nature only; it obviously could not take into account all of the possible variations in situations and fact patterns that might arise in Montana. The rule wouldn't be a laundry list of what an employer could not lawfully do, nor would it be a list of what an employer is required to do, either, but it would be helpful to at least some employers in getting a better understanding of the requirements of law.

Because there is no express statutory requirement directing the Department to specifically adopt a rule about what considerations go in to the BFOQ analysis, the Department's rulemaking on the subject has to be inferred or implied from the general grant of rulemaking provided by 49-2-204(2), MCA. Such an "advisory only" rule is defined as a "substantive rule" by 2-4-102 (13)(b), MCA. The elimination of an agency's ability to adopt an "advisory only" rule means that an agency would not be able to provide as much assistance to the public as is presently available under current law.

Please do not limit the ability of agencies to do their jobs and appropriately respond to the needs of their customers. I ask you to table or give a "do not concur" recommendation on House Bill 209. Thank you.

prepared by:

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